

2008

Steve Richards v. Diana Brown : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Richards v. Brown*, No. 20080682 (Utah Court of Appeals, 2008).
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UTAH COURT OF APPEALS

STEVE RICHARDS,

Petitioner/Appellant,

vs.

DIANA BROWN,

Respondent/Appellee.

Case No. 20080682

APPELLEE'S BRIEF

Appeal of the Judgment and Order of the Honorable Judge Denise Lindberg

Third Judicial District Court, Salt Lake County, State of Utah

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated §78A-4-103.

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional provisions which apply to this appeal. The relevant statutory provisions are limited to Utah Code Annotated §30-1-4.5.

STATEMENT OF THE CASE

1. Richards commenced this action by filing a Verified Petition for Paternity and Related Matters on December 21, 2006. (R. 1-8).
2. In the Verified Petition for Paternity and Related Matters, Richards alleged in the relevant part:
 - a. The parties had never been married (R. 1);
 - b. The parties continually resided together for over 10 years seeking an order establishing a common law marriage pursuant to UCA §30-1-4.5 (R. 3);
 - c. The parties cohabitated from May 1995 until their separation in early 2006 (R. 3);
 - d. The parties are both of legal age and capable of giving consent (R. 3);
 - e. The parties have held themselves out and acquired a reputation as husband and wife (R. 4);

- f. The Court should find the parties established a common law marriage and enter appropriate orders concerning custody, child support, and property divisions (R. 4-5); and
 - g. The Court should make an equitable division of the residential property awarding Richards a financial interest in the property representing his reasonable investment based on the parties' partnership, implied contract, or constructive trust (R. 6).
- 3. On January 10, 2007, Brown filed her Answer to the Verified Petition for Paternity and Related Matters. (R. 28-38).
- 4. In her Answer, Brown responded to the allegations, in the relevant part, by:
 - a. Admitting the parties were never married (R. 28);
 - b. Affirmatively denying that the parties separated in early 2006, alleging the parties separated in August, 2005 and therefore do not meet the cohabitation element for the establishment of a common law marriage (R. 29); and
 - c. Denial of all relief requested by Richards relating to any property and affirmatively alleging there was no property to be divided (R. 30).
- 5. On June 19, 2007, Richards filed his Certificate of Readiness for Trial wherein he certified that "counsel has completed all discovery; that opposing counsel has had reasonable time to pursue discovery; and that all discovery of record has been completed." (R. 41-42).

6. On June 19, 2007, Richards filed a financial declaration wherein he averred that he owned no interests in any real property. (R. 43-55).
7. On August 8, 2007, Brown filed a Motion for Partial Summary Judgment relating to whether Richards timely filed his request for the establishment of a common law marriage. (R. 72-81).
8. On August 8, 2007, Brown filed her Affidavit of Diana Brown in Support of Motion for Partial Summary Judgment, wherein she alleged:
 - a. She purchased the home on 459 12th Avenue in December, 1989. (R. 82);
 - b. She and Richards began residing together in May, 1995. (R. 82);
 - c. They cohabitated until the summer of 2001 when they moved into separate bedrooms and completely terminated all sexual relations with one another. (R. 83);
 - d. Richards moved out of the residence at the end of August, 2005 and took up residence at 635 K Street where he continued to reside. (R. 83); and
 - e. The Verified Petition filed in December, 2006 was more than one year after they separated in August, 2005. (R. 83).
9. On September 5, 2007, Richards filed his Response to Respondent's Motion for Partial Summary Judgment. (R. 87-93).
10. Richards did not file an affidavit in support of his Response to Respondent's Motion for Partial Summary Judgment.

11. On September 5, 2007, the Honorable Commissioner Thomas N. Arnett recommended that the Motion for Partial Summary Judgment be granted. (R. 94).
12. On September 10, 2007, Richards filed his Objection to Commissioner's Recommendation. (R. 95-99).
13. On October 15, 2007, the Court entered its Order on Motion for Partial Summary Judgment. (R. 110-113).
14. On January 9, 2008, the Court entered its Memorandum Decision on Richards Objection to Commissioner's Recommendation, thereby denying the objection. (R. 121-123).
15. In the Memorandum Decision, the Court relied on *Haddow v. Haddow*, 707 P.2d 669 (Utah 1985) for a definition of "cohabitation" which included common residency and sexual contact evidencing a conjugal association. The Court found that it was undisputed that the parties terminated all sexual contact in 2001 and Richards moved out of the residence in September, 2005. The Court found Richards had one year from the date of the termination of the common law marriage to file his Petition and his petition was not timely filed. (R. 121-123).
16. On March 24, 2008, despite having previously filed a Certificate of Readiness for Trial asserting that all discovery had been completed, Richards filed his Certificate of Service of Petitioner's First Set of Interrogatories, Request for Production of Documents and Admissions to Respondent. (R. 130-131).

17. On May 1, 2008, Brown filed a Certificate of Mailing Respondent's Answers to Petitioner's First Set of Interrogatories, Request for Production of Documents and Admissions to Respondent. (R. 139-140).
18. On May 1, 2008, Brown filed a Motion for Protective Order, Memorandum in Support, and an Attorney Certification RE: Motion for Protective Order, asserting that many of the discovery requests relate to matters previously decided on the Motion for Partial Summary Judgment. (R. 141-154).
19. After full briefing, on June 9, 2008, the Court entered its Minute Entry granting the Motion for Protective Order. (R. 193-195).
20. As a basis for granting the Motion for Protective Order, the Court found that:
 - a. Richards failed to perform his obligations to meet and confer pursuant to Rule 26(f), Utah Rules of Civil Procedure and therefore was not entitled to pursue discovery. (R. 194); and
 - b. the matter was set for trial in two weeks. (R. 194).
21. The action came before the Court on a bench trial on June 16, 2008, with all trial exhibits presented to the Court based on stipulation and the parties as the only witnesses testifying. (R. 225-226).
22. Richards testified. (R. 262). (The references to the transcript hereinafter will be designated "Tr.").
23. Richards admitted that at all times his marital status has been single. (Tr. P. 12, L. 22-23).

24. However, the parties lived together from May 1995 to August 2005 as longstanding romantic partners. (Tr. 14, L. 3-6).
25. Brown owned the home in which the parties resided having acquired the residence in approximately 1989. (Tr. P. 15, L. 4-10).
26. At the time of the parties' separation in August, 2005, Richards moved into a separate residence approximately six blocks from where he resided with Brown in the Avenues. (Tr. P. 16, L. 8-20).
27. After Richards moved out, the parties maintained a cooperative relationship so far as it concerned their daughter, including maintaining family celebrations. (Tr. P. 17, L. 7-11).
28. After the separation, Richards maintained a unilateral hope for reconciliation. (Tr. P. 18, L. 7-10).
29. In October, 2005, approximately two months after the parties separated, they engaged in mediation and resolved all issues relating to parenting by adopting a parenting plan, but did not address financial issues because the parties allotted time for mediation expired and Brown refused to return to mediation. (Tr. P. 21, L. 15 to P. 22, L. 10).
30. In explaining why he did not file his petition for establishment of a common law marriage within one year of the date of the parties' separation, Richards professed ignorance of that requirement in the law. (Tr. P. 24, L. 21-23).

31. Richards believed he had an interest in the residence based on his financial contributions to the mortgage, maintenance expenses, and improvements. (Tr. P. 25, L. 6-16).
32. Initially, Richards paid \$400 per month toward the mortgage. (Tr. P. 26, L. 1-4).
33. Thereafter, he voluntarily increased that amount to \$550 per month after the birth of the parties' daughter. At the time Richards was paying \$550 per month, the mortgage was over \$1,500.00 per month. (Tr. P. 26, L. 5-10).
34. Over the ten year period Richards resided with Brown, he paid \$71,100.00 towards the mortgage. (Tr. P. 28, L. 1-5 and P. 67, L. 9-12).
35. Neither Richards nor Brown owned any other real property. (Tr. P. 28, L. 17-19).
36. During the period of common residency, the parties' income was close to equal. (Tr. P. 29, L. 11-19).
37. The parties never had a joint bank account. (Tr. P. 29, L. 23-24).
38. While Richards listed Brown as his beneficiary on his life insurance, in contrast Brown listed the parties' minor daughter as her beneficiary. (Tr. P. 30, L. 2-9).
39. During their common residency, each party paid their own personal expenses, but as to household expenses, they tallied them up and then reconciled who owed what to whom based on who spent what during that accounting period. (Tr. P. 30, L. 10 to P. 31, L. 2).
40. Richards stated his understanding was that if the parties' relationship terminated, Brown would reimburse him for some equity in the house. (Tr. P. 36, L. 9-17).

41. At no time was there a written agreement between the parties concerning the house. (Tr. P. 37, L. 6-10).
42. Richards contributed to the household maintenance costs. (Tr. P. 38, L. 6-20).
43. Richards testified the appraised value of the house in March, 2008, three years after the parties' separation, was \$425,000.00 and the mortgage balance was \$148,000.00 at the time he moved into the residence, leaving a total equity in the property of \$277,000.00 of which sixty six percent (66%) was subject to division in this action. (Tr. P. 42, L. 7 to P. 43, L. 3).
44. Richards testified that he made approximately \$10,485.00 worth of capital improvements to the house including the cost of the construction of a deck. (Tr. P. 46, L. 3-25).
45. Richards conceded that Brown made capital improvements to the house to which he did not contribute toward their cost. (Tr. P. 48, L. 4 to P. 49, L. 9).
46. With respect to those capital improvement contributions, Richards admitted that had he desired to be reimbursed during the period of the parties' relationship, he could have asked for such reimbursement and Brown probably would have agreed. (Tr. P. 49, L. 10-19).
47. Richards testified that annually the parties discussed his desire to be placed on title to the house, but that the discussions never reached any level of detail. (Tr. P. 50, 51, and 53).

48. Richards owned and maintained the only vehicle the parties used during their relationship. However, Brown generally used public transportation for her own individual transportation needs. (Tr. P. 55, L. 20 to P. 56, L. 23).
49. Richards asserted a claim for one half of all automobile expenses he incurred during the decade of the parties' relationship. (Tr. P. 58).
50. Richards admitted there was no appraisal as to the value of the house on the date he moved into the residence. (Tr. P. 63, L. 3-20).
51. Richards never paid an amount which equaled one half of the monthly mortgage payments. (Tr. P. 68, L. 7-9).
52. Richards did not have the house appraised when he moved out in August, 2005, waiting until March, 2008 to have such an appraisal performed. (Tr. P. 69, L. 22-25 and P. 70, L. 11-12).
53. At the time of the trial, Richards was renting a home in the Avenues for \$750 per month. (Tr. P. 75, L. 4-6).
54. Brown admitted the parties discussed Richards' desire for an equity interest in the home, but Brown conditioned any such equity position on Richards buying that position by paying her one half of the equity in the home at the time of his being put on to title. (Tr. P. 97, L. 16-19 and P. 98, L. 7-13).
55. Brown did not have an appraisal of the home done at the time of her divorce from her husband Mr. Priest, leaving it to a mortgage company to calculate the equity in

the property at the time of that divorce being entered in approximately 1991. (Tr. P. 115, L. 20-25).

56. Brown testified that no appraisal was performed when Richards moved into the residence in May, 1995. (Tr. P. 116, L. 6-9).

57. When Richards was paying \$400 per month, the mortgage on the home was \$1,187.00. (Tr. P. 116, L. 10-13).

58. The parties terminated all sexual relations in 2001, when their daughter was four years old, and Richards moved into a separate bedroom within the house which was located on an entirely different floor in the house than Brown's bedroom. (Tr. P. 118, L. 16 to P. 119, L. 15).

59. When questioned by the Court, Richards admitted that some percentage of the money he paid toward the rent would have been used to pay rent elsewhere had he not been residing with Brown. (Tr. P. 138, L. 3-26).

60. During Richards closing argument, the Court noted that unjust enrichment is a restitutionary remedy which does not include a claim for appreciation. (Tr. P. 143, L. 40 to P. 144, L. 8).

61. During his closing Richards admitted there was no meeting of the minds concerning his investment in the house. (Tr. P. 149, L. 15-17 and P. 151, L. 14-18).

62. Richards conceded the theory of constructive trust did not apply. (Tr. P. 161, L. 8-9).

63. Richards admitted that there was no evidence presented concerning some of the elements of promissory estoppels. (Tr. P. 163, L. 4-16).
64. Richards conceded there was no implied in fact contract, arguing despite the lack of evidence concerning some of the elements of promissory estoppels his only two remaining claims were for unjust enrichment and promissory estoppel. (Tr. P. 164, L. 14 to P. 165, L. 16).
65. After taking the matter under advisement, on July 9, 2008, the Court issued its Finding of Fact, Conclusions of Law and Order. (R. 228-251).
66. The Court entered the following Findings of Fact:
- a. The parties never married but began living together in 1995 and a daughter was born on March 29, 1996. (R. 228, Finding #1);
 - b. During the ten years they resided together, they did so in a house owned by Brown which she received as part of her prior divorce settlement from Erik Priest on or about September, 1991. During that divorce proceeding, the parties “figured out” their equity in the house and the Brown paid off Mr. Priest’s equity in the house. (R. 228-229, Finding #2);
 - c. The parties separated in August 2005 when Richards moved out of the house and rented an apartment six blocks away, paying a monthly rent of \$750 per month. (R. 229, Finding #3);
 - d. Shortly after the separation, the parties mediated and resolved all issues relating to the minor child. Richards expected to return to mediation to discuss

financial issues, but Brown refused. As a result of these delays, Richards did not file his petition for the establishment of marriage until December 26, 2006, more than one year after the Petitioner moved out of the residence. (R. 229, Finding # 4);

- e. Petitioner's Verified Petition stated three claims for relief including a declaration of paternity coupled with joint legal and physical custody, declaration of a common law marriage, and equitable distribution of property based on theories of partnership, implied contract for services and/or constructive trust. (R. 229-230, Finding #5);
- f. Brown stipulated to the custody issues but disputed the timeliness of the Petition for declaration of a common law marriage and jurisdiction of the Court to divide the property. (R. 230, Finding #6);
- g. The parties stipulated to the temporary orders relating to the child were to become permanent, leaving for trial issues relating to property. (R. 230, Finding # 7);
- h. Respondent brought a motion for partial summary judgment declaring the petition for declaration of a common law marriage was untimely. The commissioner agreed and recommended the motion be granted. Richards objected. The Court affirmed the Commissioner's recommendation. (R. 230, Finding # 8).

- i. The parties are both trained nurses who met while Brown was still married and were friends. Eventually, Brown was divorced and several years later, the parties began living together. Their respective incomes were comparable. (R. 230-231, Finding # 9);
- j. The parties never had joint bank accounts, but Brown kept detailed written twice monthly tallies of expenditures incurred. The parties practice was that after tallying the expenditures, they would equalize who paid for what through reimbursement. (R. 231, Finding #10);
- k. The tallies were not exhaustive and did not include all of the expenditures incurred, but they accurately depicted their financial practices. Richards testified that among the expenditures which were not “tallied” included his expenditure of \$8,895.00 to replace a deck, \$312.00 towards a sprinkler system, and \$179.00 toward the purchase of a new ceiling fan. (R. 231-232, Finding # 11);
- l. Richards testified when he first moved in, he paid \$400 per month towards the mortgage and when their daughter was born he voluntarily increased the amount paid to \$550 per month. When he got a raise, he increased the amount to \$650 per month. On occasion, he wrote the check directly to the mortgage company. (R. 232, Finding 12);
- m. While Richards acknowledged his payments were less than half the mortgage, he was making other contributions to equalize the parties’ expenditures,

including his provision of the only vehicle used by the parties which he brought into the relationship. Brown admitted that Richards' financial contributions approximately equaled her contributions. (R. 232-233, Finding 13);

- n. The Court did not accept Brown's testimony the payments constituted rent. (R. 233, Finding #14);
- o. At the time Richards moved in with Brown, her mortgage was \$1187.00 per month. The amount increased over the period of the ten year common residency to \$1,516.00. Further, due to refinancing, over the course of the relationship, the mortgage balance increased rather than decreased. (R. 233-234, Finding 15);
- p. Richards testified he felt insecure about his financial position with respect to equity in the house and that during the relationship Brown represented that if the relationship terminated, he would be treated the same as was her husband in the prior divorce proceeding. Richards believed that he and Brown had an agreement concerning the equity in the property. (R. 234-235, Finding #16);
- q. Brown testified the parties did have discussion concerning the equity in the house, but stated that all such discussions were conditioned upon Richards paying one half of the then existing equity. Richards denied having any recollection of such conditions. (R. 235, Finding #17);

- r. Brown acknowledged it was important to Richards to have his name on title, but testified she believed that he failed to take advantage of the opportunity after two refinances during the relationship, and admitted that she never provided him with an amount necessary to pay out one half of the equity. Finally, Brown admitted she never seriously pursued any efforts to put Richards on title. (R. 235, Finding #18);
- s. The parties admitted that over the course of their relationship, the issue of Richards being on title increased the contention in the relationship. Richards testified that had he known he was not going to be put on title, he would have made other financial choices. Brown admitted that had Richards paid her one half of the equity, she would have put him on title. Finally, Brown stated as the parties relationship difficulties increased, her desire to put Richards on title lessened. (R. 236, Finding #19);
- t. The Court found Brown had a greater understanding of what was entailed when parties split up based on her involvement in a prior divorce proceeding. (R. 236, Finding #20);
- u. The Court found that as difficulties mounted between the parties, Brown never clearly conveyed her position with respect to what interest in the home, if any, she was willing to convey to Richards. (R. 236-237, Finding # 21);
- v. Richards never took the steps necessary to clarify his position nor secure his interest in the residence. He never took steps to have the home appraised and

therefore there was no information before the Court to assess how his contributions enhanced the value of the home. During the period of cohabitation, Brown twice refinanced the house and Richards chose not to take those opportunities to resolve his concerns one way or the other. (R. 237, Finding #22);

- w. The parties had difficulties in 2001, which exacerbated by their dispute over the house. They slept in different parts of the house. The parties intimate relationship terminated around that time. (R. 237-238, Finding #23);
- x. As part of these proceedings, the home was appraised on March 17, 2008 which concluded the present market value is \$425,000. (R. 238, Finding #25);
- y. While the Court had the present value of the home as evidence before it, there was no evidence before the Court as to the value of the home when Richards moved into the home in 1995 nor was there any evidence of its value when he moved out in August, 2005. Finally, there was no evidence as to the value of the house in 1991 when Brown acquired the home out of her prior divorce proceeding. (R. 238-239, Finding #26);
- z. While Richards presented evidence which was not disputed that he paid \$71,100 in monthly payments toward the mortgage, \$960.03 in home maintenance, \$1,024.50 in lawn service, and \$12,470 in other house expenses, the majority of which related to nearly \$9,000.00 to construct a deck, in most cases the Court could not discern whether those expenses were incurred for

household improvements, or simply involved other expenses not related to an improvement to the house. (R. 239, Finding #27)

- aa. The Court reviewed the various items set forth in Exhibit 6-B and concluded that the expenditures for the deck (\$8,800.00), and the expenditures for the purchase and installation of the swamp cooler, totaling \$750.00, were improvements to the house, however, the Court could not reach the same conclusion for the majority of the other matters set forth on Exhibit 6-B. (R. 240-241, Findings #28 & 29).

67. Based on the foregoing Findings of Fact, the Court then entered the following

Conclusions of Law:

- a. The home was clearly “premarital property” belonging to Brown. (R. 241, Conclusion #30);
- b. The parties never married, so there is no “marital estate” to divide. When the parties resolved the custody related issues and the Court granted partial summary judgment on the common law marriage claim, the case lost its character as a “domestic” case. However, because Richards asserted civil claims, the case proceeded to trial. In closing argument, Richards abandoned all claims except unjust enrichment and promissory estoppels. (R. 241-242, Conclusion No. 31);

- c. Richards is not entitled to any share of equity in the home, although the Court found he did set forth a claim for unjust enrichment. (R. 242, Conclusion No. 32);
- d. After setting forth the elements of a claim for unjust enrichment, the Court concluded that the evidence supported a claim of unjust enrichment for the amount paid for the new deck (\$8,895.00) and it would be unjust to permit Brown to retain that benefit without paying the cost thereof. (R. 242-243, Conclusion #33);
- e. In addition, the Court made the same finding with respect to the costs incurred for the purchase and installation of the swamp cooler (\$750.00), sprinkler system expenditures (\$312.00), and the purchase of a ceiling fan (\$179.00) finding the total amount by which Brown was unjustly enriched to be \$10,136.00. (R. 243, Conclusion #34);
- f. With respect to any other amounts, the Court found Richards failed to meet his burden of proof. (R. 243, Conclusion #35);
- g. The Court found it a closer issue whether Richards proved a right to make claim for mortgage payments, yet the Court found Richards may not recover any part of those payments. (R. 244, Conclusion #36);
- h. The Court found Richards would not have been entitled to recover the full amount of those payments because had he not been residing with Brown, he would have incurred a housing expense elsewhere. The Court was not able to

adequately determine what amount should be attributed to a fair rental value of the property. The best evidence before the Court was that prior to Richards moving in with Brown, she rented a portion of her house to a friend for \$300.00 per month. Thereafter, Richards began paying \$400 per month, then \$550 and ultimately \$650 per month. After moving out of the residence, Richards rented a housing unit for \$750 per month. Thus, the Court concluded that the amounts he contributed each month approximated the reasonable rental value. (R. 244, Conclusion #37);

- i. The Court gave little credence to Richard statements that but for his understanding he was accruing equity in the residence, he would have made other choices financially. The Court found that no evidence was presented to the Court regarding his financial wherewithal to either pay a down payment or secure a mortgage. Richards took no action to secure his position, which the Court found suggests he was not in the position to do so. Therefore, the Court concluded it could not being to assess what portion of those payments could have created a partial equity interest for Richards. (R. 245, Conclusion # 38);
- j. The Court concluded Richards failed to meet his burden of proof that any portion of the \$71,100 in payment unjustly enriched Brown. (R. 245-246, Conclusion #39);
- k. The Court concluded the rest of the expenditures were normal living expenditures. (R. 246, Conclusion #40);

l. The Court then set forth the elements for promissory estoppels and concluded that Richards failed to meet his burden of proof with respect to those elements. The Court concluded that even if Richards met his burden with respect to Brown's promise to put him on title to the house, he failed to meet his burden with respect to the other two elements: reasonable reliance nor damage based on that reliance. (R. 246, Conclusion 41);

m. The Court concluded there was no evidence that Richards acted prudently. The Court concluded that a reasonable person concerned about the security of his position with respect to equity in the house would have taken affirmative steps to protect that interest. In addition, the Court concluded there was no evidence presented to the Court that Richards suffered a loss. (R. 247, Conclusion #42);

n. The Court concluded that Richards failed to meet his burden of proof that he conferred a benefit on Brown with respect to the vehicle and related expenses and therefore denied that claim. (R. 247-248, Conclusion #43);

o. The Court concluded there was no basis for an award of attorney fees based on the claims of unjust enrichment or promissory estoppels. (R. 248-249, Conclusion #44 & 45);

68. Based on the Findings of Fact and Conclusions of Law, the Court entered the following Order:

- a. Petitioner's counsel was to prepare and submit for the Court's signature a final order and Determination of Paternity pursuant to the parties' stipulation. (R. 250, Order #47); and
- b. With respect to all other issues addressed in this decision, the Court's Finding of Fact, Conclusions of Law and Order shall be the final Order of the Court and no other form of order will need to be submitted by counsel. (R. 250, Order #48).

69. Counsel for Richards, the Petitioner, never submitted the final order and determination of paternity pursuant to the parties' stipulation.

70. Brown paid Richards the sum of \$10,136.00 as ordered by the Court. (A copy of the payment and an Affidavit from the Title Company that the check cleared is attached hereto as Exhibit A and incorporated herein by this reference).

71. Richards has not filed a satisfaction of judgment in the trial court.

SUMMARY OF THE ARGUMENTS

Richards failed to marshal the evidence relating to all factual issues. Richards also waived his right to appeal based on acceptance of Brown's voluntary payment of the judgment. The Court correctly held that upon the end of the parties' cohabitation, their relationship terminated. The Court decided the issue as a matter of law, and therefore no evidentiary hearing was necessary. The Court properly granted the protective order based on the proximity to trial, the failure to comply with Rule 26(d), Utah R. Civ. P.,

and Richards' Certificate of Readiness for Trial. The Court properly applied the correct legal standard on the claims of unjust enrichment. The Court properly distinguished home improvement expenses from maintenance expenses. Finally, Richards waived, stipulated or abandoned his claims relating to implied contract and constructive trust.

ARGUMENT

I.

RICHARDS FAILED TO MARSHAL THE EVIDENCE

With respect to all claims upon which Richards challenges the factual findings of the Court, it was his burden to marshal the evidence. *In Interest of K.F.*, 2009 UT 4. This obligation required Richards to provide this Court with all of the evidence which supported the trial court's decision. *Id.* Richards failed to meet his burden of marshalling. Therefore, this Court should deny his requests for relief.

II.

RICHARDS WAIVED HIS RIGHT TO APPEAL

After the stipulation resolving the issues related to the parties' minor child, the only remaining issues related to monetary relief. After hearing all of the evidence and carefully considering that evidence, the Court concluded that with respect to the majority of his claims, Richards failed to meet his burden of proof. (R. 243, Conclusion #35; R. 245-246, Conclusion #39; R. 246, Conclusion #41; R. 247-248, Conclusion #43). However, with respect to monies paid for capital improvements including a deck, ceiling fan, and swamp cooler, Richards met his burden of proof and was awarded a judgment in

the amount of \$10,136.00. (R. 243, Conclusion #34). Thereafter, Brown paid the judgment in full. (Exhibit “A”).

By accepting payment in full, Richards waived his right to appeal, rendering the issues on appeal moot. In *Jensen v. Eddy*, 30 Utah 2d 154, 514 P.2d 1142 (1973), the Court stated the general rule is that “if a judgment is voluntarily paid, which is accepted, and a judgment satisfied, the controversy has become moot and the right to appeal is waived.” *Id.* At 157; *see also West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1316 (Utah Ct. App. 1991); *Jacobsen, Morrin & Robbins Constr. Co. v. St. Joseph High Sch. Bd. Of Fin. Trs.*, 794 P.2d 505, 506 (Utah Ct. App. 1990). Because Brown voluntarily paid the judgment and payment was accepted by Richards, he waived his right to appeal and rendered all monetary issues moot.¹

III.

THE COURT CORRECTLY HELD THAT UPON THE TERMINATION OF COHABITATION, THE RELATIONSHIP TERMINATED AS A MATTER OF LAW

The Court correctly held for purposes of the statute of repose for the establishment and declaration of a common law marriage, the one year period to file after the termination of the relationship begins to run when the parties ceased cohabiting. Richards argues that the Court improperly overemphasized a single element, cohabitation, over all other elements. In fact, if any one element ceases to exist a common law marriage does not exist and therefore the relationship is terminated. While no

¹ Brown admits there is no satisfaction of judgment in the record.

single factor is determinative in the trial court's analysis, and while "numerous factors should be considered," evidence proving each of the five statutory elements is essential. *See Whyte v. Blair*, 885 P.2d 791, 793 (Utah 1994). The parties must make a showing of capacity to marry, capacity to give consent, assumption of marital rights and duties, cohabitation, and a holding out as, and acquiring a uniform and general reputation as, husband and wife. See Utah Code Ann. § 30-1-4.5(1)(a)-(e) (1998). If any one of the elements is missing, the relationship is terminated for purposes of the statute of repose. The Court correctly found when the element of cohabitation no longer applied, the relationship was terminated and the statute of repose was triggered requiring the filing of the petition within one year of the termination of the relationship.

While Utah law has not clearly settled this issue, there are cases which are relevant to the discussion. In *In re Marriage of Kunz*, 2006 UT App 151, 136 P.3d 1278, the Court addressed whether a petition was timely filed under UCA §30-1-4.5. In *Kunz*, the appellant argued that her petition was timely filed when it was brought within one year of her husband's death. Appellee argued that because the decedent was ceremonially married, upon his securing a marriage license, he was not longer legally capable of consenting to a common law marriage. Thus, the one year period commenced to run from the date the marriage license was issued. Implicitly, the Court ruled that upon the failure of any one element, the statute of repose was triggered and the movant had one year from that date to file a petition to establish the validity of the common law marriage.

Similarly, in *Clark v. Clark*, 2001 UT 44, 27 P.3d 538, the Court found that the parties cohabited until they permanently separated on August 28, 1996. A few months later, the Petitioner filed her action to establish a marriage. On appeal, the trial court's decision was affirmed based on its finding that the parties ceased cohabiting, and therefore their relationship terminated, within one year of the filing of the petition to establish the marriage and for a resulting divorce. The instant case is similar to *Clark*. In the instant case, the Court found the parties permanently separated in late August, or early September, 2005. (R. 229, Finding #3). Richards did not file his Petition until December, 2006. Therefore, the Court ruled the Petition was not timely filed based on the date of the parties' permanent separation being the best evidence of the termination of their relationship.

In *Bunch v. Bunch*, 906 P.2d 918 (Utah App. 1995), the Court considered whether a petition was filed within one year of the termination of the relationship. In *Bunch*, the parties separated in August 1990, and the petitioner filed her action in May, 1991. On a Motion to Dismiss, the Court granted the motion based on the failure to file within one year of the termination of the relationship, *i.e.* the parties' separation in August 1990. On appeal, the trial court was affirmed.

The foregoing supports the trial court's conclusion that upon the cessation of cohabitation, the statute of repose began to run. Richards had one year from that date, August or September, 2005. Richards failed to timely file the petition, doing so more

than one year after the termination of the parties, the Court properly granted partial summary judgment to Brown.

IV

THE COURT DID NOT NEED TO HOLD AN EVIDENTIARY HEARING ON THE ISSUE OF WHEN THE RELATIONSHIP TERMINATED

No evidentiary hearing needed to be held on the question of when the parties' relationship terminated because there were no genuine issues of material fact, and the determination of when the relationship terminated was a question of law. As such, the trial court was proper in deciding the issue on summary judgment.

Prior to the filing of the Motion for Summary Judgment, the record contained the following relevant statements:

- a. Richard's Verified Petition: (1) "Petitioner and Respondent have never been married . . . " (R. 1, ¶2); (2) "The parties cohabited since at least May 1995 until their separation in earl 2006 . . . " (R. 3, ¶14); (3) "The parties cohabited together from at least May 1995 until early 2006." (R. 5, ¶23);
- b. Affidavit of Steve Richards²: "We have resided together since May 1995 on a continuous basis until separating initially in the fall of 2005 and on a permanent basis in January 2006." (R. 13, ¶3);
- c. Affidavit of Diana Brown in Support of Motion for Partial Summary Judgment: (1) "We cohabitated and stayed in the same room together until the summer of 2001 at which time the romantic aspects of the relationship fully deteriorated." (R. 83, ¶5); (3) "During the summer of 2001, after effectively severing all romantic aspects of our relationship, we moved into separate bedrooms. I resided in the upstairs master bedroom and the Petitioner resided in the main floor guest bedroom." (R. 83, ¶6); (4) "We no longer had any sort of sexual relationship or any romantic relationship after the summer of 2001." (R. 83, ¶7); and (5) "The Petitioner moved out of the 12th Avenue home at the

² Richards Affidavit was filed in support of his Motion for Temporary Orders.

end of August 2005 and took up residency at 635 K Street where he continues to reside.” (R. 83, ¶8);

- d. Response to Respondent’s Motion for Partial Summary Judgment³: (1) “The parties have one child together, namely Stephanie A. Brown-Richards (DOB 3/29/96) and cohabited for approximately ten years from May 1995 until Petitioner moved out of Respondent’s home in approximately September 2005.” (R. 87, ¶1); and (2) “The Petitioner states in his Verified petition for Paternity and Related Matters that he considered his separation from Respondent to be in early 2006 under UCA 30-1-4.5(1)(c).” (R. 88, ¶3).

While Brown supported her motion for partial summary judgment with an affidavit, Richards failed to file a counter affidavit. Rule 56(e), Utah Rules of Civil Procedure clearly states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

Rule 56(e), Utah R. Civ. P. Because Richards did not file an affidavit in opposition to the motion for summary judgment which was properly supported by Brown’s affidavit, there was no genuine issue of material fact.

While it is undisputed that based on the clear language of the rule Richards failed to create a genuine issue of material fact through filing his own counter affidavit, Brown acknowledges the existence of a Verified Petition and the prior affidavit Richards

³ Richards did not file an affidavit in opposition to Brown’s Motion for Summary Judgment.

filed in support of his motion for temporary orders. (R. 1 and R. 13 respectively). Despite the clarity of the rule, in *Pentecost v. Harward*, 699 P.2d 696 (Utah 1985), the Court acknowledged that in some cases, a verified petition may satisfy the rule's requirement. *Id.* At 699. In determining whether a verified petition meets that requirement, the *Pentecost* court stated a "verified pleading, made under oath and meeting the requirements for affidavits established in Rule 56(e) . . . can be considered the equivalent of an affidavit for purposes of a motion for summary judgment." *Id.* In *Pentecost*, the Court found the verified pleading failed to meet the requirements of Rule 56(e) because rather than stating the facts were true and correct, it merely verified the pleading. *Id.* In addition, it impermissibly qualified the personal knowledge with statements relating to "information" and "belief". *Id.* Finally, some of the statements were not facts at all but rather assumptions or conclusions. *Id.*

Based on the standard set forth in *Pentecost*, one must review the documents on file first against that standard. After making that determination, each of the documents must be viewed as they relate to the specific factual averments contained Brown's affidavit. A review of these documents based on these standards evidences a lack of *genuine* issue of material fact.

First, Richards conceded that he moved out of the residence in September 2005. (R. 87, ¶1). While Brown stated he moved out in August 2005 (R. 83, ¶8), this factual dispute of a single month was not *material* to the Court's determination because regardless of what date the court accepted, it would not alter its decision.

Second, Richards did not rely on his affidavit filed in support of his motion for temporary orders in responding to the motion for summary judgment. It is not mentioned in his response.

Third, Richards did rely on his Verified Petition, specifically stating “Petitioner states in his Verified petition for Paternity and Related Matters that he considered his separation from Respondent to be in early 2006.” (R. 88, ¶3). However, in so doing, he did not provide the Court with any specific reference to any paragraph in the verified petition. Further, the statement is the equivalent not to a statement of fact, but a conclusion. Second, the Verified Petition suffers from the same deficiencies which were present in *Pentecost*. Richards verifies the entire document, not merely the factual assertions contained therein. The verification is subject to the improper qualifications of “information” and “belief.” Finally, the only relevant allegation in the verified petition is a hybrid statement of fact and conclusion. (R. 3, ¶14). As such, the verified petition does not meet the requirements of Rule 56(e), Utah R. Civ. P.

Assuming arguendo verified petition could be properly considered, it nonetheless failed to specifically rebut a number of the factual assertions contained in Brown’s affidavit. The verified petition did not rebut the facts that in the summer of 2001, all romantic aspects of the relationship terminated, including all sexual relations. (R. 83, ¶¶5, 6, 7). The verified petition did not rebut the fact that Richards moved out of Brown’s house in August 2005. (R. 83, ¶8). Therefore, the verified petition did not create a genuine issue of material fact which would have precluded summary judgment.

Without a genuine issue of material fact, there was absolutely no basis for the Court to hold an evidentiary hearing on the issue of when cohabitation.

Without a question of fact, the Court properly granted summary judgment. The issue before the Court was whether the petition was timely filed. While it may have required the consideration of some underlying facts, the ultimate determination on the timeliness of filing under the common law marriage, the statute of repose is a question of law. *See Nolan v. Hoopiaina*, 2006 UT 53, ¶ 19, 144 P.3d 1129; *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 18, 108 P.3d 741. *Gramlich v. Munsey*, 838 P.2d 1131, 1132 (Utah 1992); and *McKean v. McBride*, 884 P.2d 1314, 1316-17 (Utah App. 1994), *cert. denied*, 899 P.2d 1231 (Utah 1995). Therefore, the Court correctly decided the issue as a matter of law without holding an evidentiary hearing.

V.

THE COURT PROPERLY GRANTED THE PROTECTIVE ORDER

Contrary to Richards's assertions, the trial court properly granted the protective order. It is without question that the trial court has the right to limit discovery. In reviewing such questions, this Court applies an abuse of discretion standard. *Cannon v. Salt Lake Reg'l Med. Ctr.*, 2005 UT App 352, ¶ 7, 121 P.3d 74.

In the instant case, the trial court granted Brown's protective order and denied Richards the right to pursue discovery. The basis of this decision was not only the proximity of the requests to the date of trial, but Richards's failure to comply with the clear dictates of Rule 26(d), Utah R. Civ. P. Rule 26(d) is crystal clear:

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). . . .

Rule 26(d), Utah R. Civ. P. Despite having been specifically ordered by the Court to do so, Richards failed to initiate an attorney planning conference to confer on the matters set forth in Rule 26(f) and therefore was not entitled to discovery. (R. 194). While not a basis for the Court's decision, an additional basis to support that decision was Richards filing of his Certificate of Readiness for Trial wherein he affirmatively represented to the Court that all discovery had been completed. (R. 139-140).

The trial court properly exercised its discretion in granting the protective order. With trial two weeks away and the complete failure to comply with Rule 26(d), coupled with Richards certificate of readiness for trial containing his affirmative representation that all discovery had been completed, the trial court did not abuse its discretion.

VI.

THE COURT CORRECTLY APPLIED THE LEGAL STANDARD OF UNJUST ENRICHMENT

Richards incorrectly argues the Court failed to properly apply the correct legal standard for a claim of unjust enrichment. To the contrary, the Court correctly applied the legal standard and correctly determined that Richards failed to meet his burden of proof.

The elements for a claim of unjust enrichment are set forth in *Jeffer v. Stubbs*, 970 P.2d 1234, 1248 (Utah 1998). These three elements include:

- (1) A benefit conferred upon one person by another;
- (2) An appreciation or knowledge by the conferee of the benefits;
- (3) The acceptance or retention of the benefit under circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.

Id. In its Findings of Fact, Conclusions of Law and Order, the Court correctly set forth these elements. (R. 242-243, Conclusion #33).

Richards' arguments concerning this issue miss the point. Richards simply failed to meet his burden of proof. Richards makes the conclusory statement that Richards' payments toward the mortgage over a ten year period clearly conferred a benefit upon Brown. However, at trial, Richards failed to provide the court with any evidence which allegedly quantified that benefit. For instance, Richards could have presented the Court with an amortization schedule from the lender establishing the amount of interest and principal which was paid during the parties' relationship. He could have presented evidence as to what percentage of that interest and principal reduction was attributable to his payments. By so doing, he could have shown that he possibly conferred a benefit upon Brown. However, Richards failed to provide the Court with this evidence. It was not the trial court's misapplication of the law which defeated Richards' claim, it was his failure to meet his burden of proof.

Richards further argues that Brown had an appreciation of the benefit which was being conferred upon her by Richards. To the extent that Brown knew Richards was making payments to contribute toward the housing expense, this is not disputed.

Finally, Richards argues that under the circumstances, it would be inequitable to permit Brown to retain that benefit without compensation to Richards. Richards further argues he relied on Brown's representations concerning adding him to the title which equates to the inequitable circumstances which provide a basis for an award of unjust enrichment as it relates to the mortgage payments. There are two problems with this argument. First, there was no meeting of the minds by the parties concerning putting Richards on title, as it was nothing more than an undefined discussion with no detail. (Tr. P. 50, 51, and 53). Brown testified that at all times, any discussion about putting Richards on title included a requirement that he pay her one half of the equity which was in the property as a condition precedent to putting him on title. (Tr. P. 97, L. 16-19 and P. 98, L. 7-13). Based on these conflicting statements about the alleged agreement concerning putting Richards on title, there was no meeting of the minds.

The Court found Richards would not have been entitled to recover the full amount of those payments because had he not been residing with Brown, he would have incurred a housing expense elsewhere. The Court was not able to adequately determine what amount should be attributed to a fair rental value of the property. The best evidence before the Court was that prior to Richards moving in with Brown, she rented a portion of her house to a friend for \$300.00 per month. Thereafter, Richards began paying \$400 per

month, then \$550 and ultimately \$650 per month. After moving out of the residence, Richards rented a housing unit for \$750 per month. Thus, the Court concluded that the amounts he contributed each month approximated the reasonable rental value. (R. 244, Conclusion #37).

The Court gave little credence to Richard statements that but for his understanding he was accruing equity in the residence, he would have made other choices financially. The Court found that no evidence was presented to the Court regarding his financial wherewithal to either pay a down payment or secure a mortgage. Richards took no action to secure his position, which the Court found suggests he was not in the position to do so. Therefore, the Court concluded it could not being to assess what portion of those payments could have created a partial equity interest for Richards.

The Court concluded Richards failed to meet his burden of proof that any portion of the \$71,100 in payment unjustly enriched Brown. (R. 245-246, Conclusion #39). It was not a misapplication of the law, it was a failure on Richards part to prove his case. As such, this Court should affirm the decision of the trial court.

VII

THE COURT PROPERLY DISTINGUISHED BETWEEN HOME IMPROVEMENT AND MAINTENANCE EXPENSES

The trial court properly distinguished home improvement expenses and maintenance expenses. Richards' argument is that he was entitled not only to restitution for the payments he made but also for appreciation on those payments. After considering

the matters before it, the Court essentially found Richards was entitled to be recompensed for the fixtures he paid for which attached to the property (*i.e.* the deck, swamp cooler, and ceiling fan), but not for routine maintenance expenses (*i.e.* lawn care service). This distinction is significant. The Court found Richards met his burden of proof regarding a benefit being conferred upon Brown only with respect to those fixtures for which Richards paid. However, the trial court found with respect to all other expenditures relating to the care or maintenance of the property, Richards failed to meet his burden of proof. (R. 243, Conclusion 34 and 35). Thus, the Court correctly distinguished not only between fixtures versus routine maintenance, but more importantly those items for which Richards did and did not meet his burden of proof.

VIII

THE COURT CORRECTLY RULED ON ALL CLAIMS RELATING TO BOTH THE MORTGAGE PAYMENTS AND EQUITY CLAIMS

The Court correctly ruled on Richards failed to meet his burden of proof with respect to the claims based on his payments applied toward the mortgage, his claim for equity in the residence, as well as his claims for a division of the appreciation in the residence. As such, this Court should affirm the decision of the trial court.

It is undisputed that Richards paid part of the monthly mortgage payment during his ten year period cohabitation with Brown. However, based on the totality of the evidence, the trial court ruled that Richards was not entitled to recover any of the mortgage payments he paid, nor any interest in the property.

The Court found that no evidence was presented to the Court regarding his financial wherewithal to either pay a down payment or secure a mortgage. Richards took no action to secure his position, which the Court found suggests he was not in the position to do so. Therefore, the Court concluded it could not being to assess what portion of those payments could have created a partial equity interest for Richards. (R. 245, Conclusion # 38).

The Court concluded Richards failed to meet his burden of proof that any portion of the \$71,100 in payment unjustly enriched Brown. (R. 245-246, Conclusion #39). Because Richards failed to meet his burden of proof, the Court correctly ruled he was not entitled to any reimbursement for any part of the mortgage payments Richards paid. In addition, the Court ruled as a matter of law that unjust enrichment is a restitutionary claim for relief. *Emergency Physicians Integrated Care v. Salt Lake County*, 2007 UT 72, ¶ 10, 167 P.3d 1080.

In addition, the trial court correctly ruled that appreciation is not an allowable measure of damages based on a claim for unjust enrichment. As stated over fifty years ago in the case of *Bough v. Darley*, 112 Utah 1, 184 P.2d 335, 339 (1947), "[I]n an action for unjust enrichment, in those cases where there is a proper equitable basis for the same, the measure of damages, by the great weight of authority, is the reasonable value of the services rendered." Applying the same to a claim for unjust enrichment based on payment for fixtures attached to real property, the measure of damages is the reasonable value of fixture, not the appreciated value of the property to which it is affixed. Finally,

there was simply no evidence before the trial court regarding how much, if at all, these fixtures increased the value of the property. Thus, there was nothing upon which the Court could grant Richards more than the cost of the fixtures.

IX

THE TRIAL COURT CORRECTLY FOUND RICHARDS FAILED TO MEET HIS BURDEN OF PROOF ON HIS CLAIM OF PROMISSORY ESTOPPEL

The Trial Court correctly found Richards failed to meet his burden of proof on the claim of promissory estoppel. This Court should affirm the trial Court's order.

The Court's Conclusions set forth the elements for promissory estoppel and concluded that Richards failed to meet his burden of proof with respect to those elements. The Court concluded that even if Richards met his burden with respect to Brown's promise to put him on title to the house, he failed to meet his burden with respect to the other two elements: no reasonable reliance or damage based on that reliance. (R. 246, Conclusion 41).

First, Richards failed to marshal the evidence in support of the Court's finding that his reliance was not reasonable and that he was not damaged as a result of what he alleged was his reliance. Second, Richards failed to adequately brief the argument relating to promissory estoppel. As such, this Court should not consider the issue. Third, Richards wants the Court's finding that his testimony was more credible than the testimony of Brown elevated to a height of requiring the Court to find his conduct reasonable. Such is not the case. Without question, the Court has the right and duty to make its decision, regardless of what testimony it found more credible, on the quantum of

evidence before it. Where that quantum of evidence fails to satisfy the burden of proof, it must deny the claim. With respect to the claim of promissory estoppel, the Court correctly found that Richards failed to meet that burden of proof. This fact was admitted by Richards counsel when she conceded there was no evidence presented concerning some of the elements of promissory estoppel. (Tr. P. 163, L. 4-16).

The Court concluded there was no evidence that Richards acted prudently. The Court concluded that a reasonable person concerned about the security of his position with respect to equity in the house would have taken affirmative steps to protect that interest. In addition, the Court concluded there was no evidence presented to the Court that Richards suffered a loss. (R. 247, Conclusion #42).

These conclusions, based on the evidence before the Court, must be affirmed.

X

THE TRIAL COURT PROPERLY REFUSED TO CONSIDER RICHARDS CLAIMS OF BOTH IMPLIED CONTRACT AND CONSTRUCTIVE TRUST

The trial court properly refused to consider Richards' claims of both implied contract and constructive trust. Richards specifically waived his pursuit of those claims in closing argument. (R. 241-242, Conclusion No. 31). Richards stipulated that he failed to prove any form of constructive trust or implied contract. Richards waived or abandoned those claims. Therefore, he cannot now claim error when he induced that conduct by the trial court.

In addition to the foregoing, Richards failed to adequately brief these issues to this Court. As such, this Court should not consider the arguments.

STATEMENT OF RELIEF REQUESTED

This Court should deny all relief requested by Richards. In addition, this Court should award Brown her cost and attorney fees in having to defend against this appeal.

CONCLUSION

Richard failed to marshal the evidence relating to all factual issues. Richards also waived his right to appeal based on acceptance of Brown's voluntary payment of the judgment. The court correctly held that upon the end of the parties' cohabitation, their relationship terminated. The Court decided the issue as a matter of law, and therefore no evidentiary hearing was necessary. The Court properly granted the protective order based on the proximity to trial, the failure to comply with Rule 26(d), Utah R. Civ. P., and Richards certificate of readiness for trial. The Court properly applied the correct legal standard on the claims of unjust enrichment. The Court properly distinguished home improvement expenses from maintenance expenses. Finally, Richards waived, stipulated or abandoned his claims relating to implied contract and constructive trust. This Court should affirm the decision of the trial court.

Respectfully submitted this 1 day of April, 2009.



Tineke Van Dijk
Attorney for Appellee

Exhibit A

STEVE RICHARDS,
Petitioner/Appellant,

DIANA BROWN,
Respondent/Appellee.

AFFIDAVIT OF MARY JANE JOHNSON

STATE OF UTAH)
 : ss
County of Salt Lake)

1. I am Mary Jane Johnson, HR/Accounting Director at Founders Title Company.

2. On October 6, 2008 check number 24078 was issued to Steve Richards for payment per Lender/Brown from the Founders Title Company Trust Account # 7.

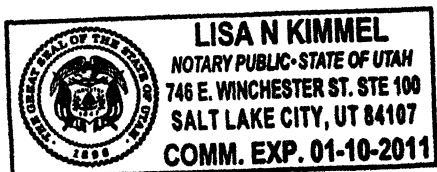
3. The check was in the amount of \$10,136.00.

4. The check cleared the Trust Account on October 22, 2008.

DATED this 30th day of March of 2009.

Mary Jane Johnson
Mary Jane Johnson,
HR/Accounting Director
Founders Title Company

Subscribed and sworn to before me, a Notary Public, this 30th day of March, 2009.



Lisa N Kimmel
Notary Public

10/22/08 Check 24078 Amount 10,136.00

FOUNDERS TITLE COMPANY
TRUST ACCOUNT #7
748 EAST WINCHESTER #100
SALT LAKE CITY, UTAH 84107

BRIGHTON BANK
840 West North Temple
Salt Lake City Utah 84110

97 250/1243

24078

PAY
TO THE
ORDER
OF

TEN THOUSAND ONE HUNDRED THIRTY-SIX DOLLARS AND NO CENTS

DATE
10/06/2008

AMOUNT
*****\$10,136.00**

STEVE RICHARDS

PAYMENT PER LENDER/BROWN

Escrow Branch: 00075005 - 001 / KKB

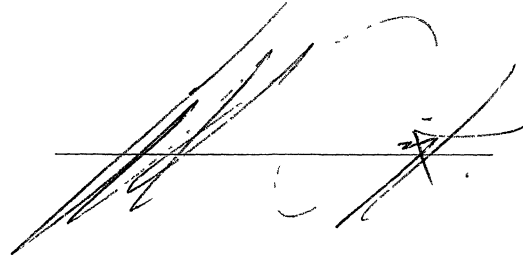
024078 12430250314 01885

0001013600

CERTIFICATE OF HAND DELIVERY

This is to certify that on the 7 day of April, 2009, I hand delivered a true and correct copy of the foregoing document to the person named below:

Suzanne Marelius
261 East 300 South, Suite 300
Salt Lake City, UT 84111

A handwritten signature in dark ink, consisting of several overlapping, sweeping strokes, positioned over a horizontal line.